Filed 4/26/06 Plummber v. Robson CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MARK B. PLUMMER,

Plaintiff and Appellant,

v.

ROBERT B. ROBSON,

Defendant and Respondent.

F047301

(Super. Ct. No. 146909)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Ronald W. Hansen, Judge.

Law Offices of Mark B. Plummer and Mark B. Plummer for Plaintiff and Appellant.

Cyril L. Lawrence and Sean P. McLeod for Defendant and Respondent.

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Plaintiff Mark B. Plummer (Plummer) filed a lawsuit against defendant Robert Robson, as Receiver for Mapleleaf Pistachio Ranch, a California limited partnership (Mapleleaf), to recover $67,526.96 in litigation expenses he advanced on Mapleleaf's behalf while he was their attorney of record in another case. Plummer appeals from the judgment entered in Mapleleaf's favor following a bench trial. We will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In 1995, Plummer's father, who became Mapleleaf's general partner after Robson, asked Plummer if he would assist in representing Mapleleaf, as he claimed Robson would not turn over any partnership money or records. As a result of a lawsuit Plummer filed in Merced County Superior Court, a second vote was held and Plummer's father confirmed as Mapleleaf's general partner. After it appeared a substantial amount of partnership money was missing, a second lawsuit was filed against Robson in Merced County Superior Court, and the two lawsuits consolidated. Mapleleaf retained Plummer to represent it in the second lawsuit over the missing money on a contingency basis. According to Plummer, Mapleleaf entered into a written contingency agreement with him, but by the time of trial in the instant case, he could not find the written agreement. Under this agreement, Plummer expected to be reimbursed for any costs he paid after the lawsuit was settled, regardless of whether Mapleleaf obtained any monetary recovery.

From February 1996 through January 18, 2000, Plummer advanced Mapleleaf $78,526.96 in costs. Mapleleaf paid some of these costs when Plummer's father was general partner – $5,000 in 1998 and $6,000 in 1999. This left an unpaid balance of $67,526.96. Plummer kept records of the costs advanced on his computer by entering the costs in the record on the date he incurred them. He then printed out an updated record, which he placed in a book pertaining to the lawsuit. On both occasions when Mapleleaf made a payment toward costs, Plummer did not send out a billing statement; instead, he called his father and asked for money because the costs were adding up.

On April 22, 1999, Plummer substituted out as Mapleleaf's attorney of record on the complaint, although he continued to represent Mapleleaf on a cross-complaint filed in that case. That same month, Mapleleaf entered into a written contingency agreement with Rob Kilborne, the attorney who took over the case. In this agreement, Kilborne and Mapleleaf agreed that Mapleleaf would bear all costs incurred prior to the date of the agreement. Kilborne agreed to take over the case if either Mapleleaf or Plummer brought

the outstanding costs current, which included making payments on existing bills to Mapleleaf's retained expert, Peat Marwick. In order to satisfy his agreement with Kilborne, Plummer made several payments to Peat Marwick to bring Mapleleaf's account current, some of which were made after Kilborne took over the case, after trying, unsuccessfully, to get Mapleleaf to pay Peat Marwick directly. Although Plummer does not normally mail out statements of costs to contingency-fee clients before a settlement or verdict is obtained, he did so in this case, as he gave a copy of the costs incurred to Kilborne, who forwarded it to Mr. Seaman, who was Mapleleaf's receiver at that time.

On May 1, 2001, a judgment unfavorable to Mapleleaf was entered in the underlying action. Some time shortly thereafter, Plummer requested Mapleleaf reimburse him for the costs he advanced, but never received payment. Plummer renewed the request for payment several times, and asked that the parties work things out, since there did not appear to be enough money to pay all of Mapleleaf's creditors.

On June 10, 2003, Plummer filed this action seeking recovery of the $67,526.96 on various common counts. Following a trial that lasted less than one day, the court found: (1) Plummer's causes of action for open book account, services rendered, money lent and money paid for Mapleleaf's benefit all accrued on May 1, 2001, the date of judgment in the underlying action; (2) the complaint in this action was filed on June 10, 2003, more than two years after the causes of action accrued; (3) the causes of action for services rendered, money lent, and money paid for defendant's benefit were barred by the two-year statute of limitations contained in Code of Civil Procedure section 339; (4) Plummer had not established an open book account because there was no evidence the parties intended an open book account, and the payments Plummer made after he substituted out of the case were made pursuant to his agreement with Kilborne, not because of an agreement with Mapleleaf. The court granted judgment in Mapleleaf's favor. Plummer appeals.

DISCUSSION

Plummer challenges only the trial court's finding that he failed to establish the existence of an open book account. Specifically, Plummer contends the trial court erred in finding: (1) the parties did not intend to establish an open book account; (2) there was no evidence of an ongoing debtor-creditor relationship; and (3) the contingency fee agreement prohibited the creation of an open book account.

As a threshold matter, we address Mapleleaf's contention, raised in a supplemental letter brief, that we "may wish to find the appeal moot" because on July 14, 2005, the trial court in a separate receivership action, Merced Superior Court Case No. 144186, issued an order terminating the receivership, distributing the assets, and discharging the receiver. Mapleleaf asserts that should we reverse this case, there is no defendant against whom judgment may be rendered. Plummer responds that he attempted to assert his claim in that action, but the trial court found he had to file a separate action and gave him permission to do so, and argues he may be able to collect on the receiver's performance bond, citing *Vitug v. Griffin* (1989) 214 Cal.App.3d 488, 494. Based on the record before us, we decline to find the appeal moot, as Mapleleaf has not shown that postjudgment events have caused issues to become moot or that Plummer could not be granted any effective relief even if he were to prevail on this appeal. (See *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813; *Consol. etc. Corp. v. United A. etc. Workers* (1946) 27 Cal.2d 859, 863.)[1]

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[1] In his opening brief, Plummer requests that we take judicial notice of the fact the judgment in Merced Superior Court Case No. 131055 was entered on May 1, 2001, and "[t]hat all of the reports to the Court by the various Receivers for Mapleleaf, in Merced Superior Court, Case No. 144186, acknowledged [] Plummer's claim as a debt and that Plummer has demanded payment." This request fails to comply with rule 22(a) of the California Rules of Court, which requires a separate motion and copies of the matter to be judicially noticed. We advised Plummer of these requirements in a letter dated July 1, 2005. We now deny the request, because Plummer has failed to furnish "sufficient information," (Evid. Code, § 453) e.g., copies of the documents, to the Court and the

Neither party requested a statement of decision. If a party waives a statement of decision by failing to request it, we presume the trial court made all factual findings necessary to support the judgment for which substantial evidence exists in the record. (*Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 792-793, superseded on other grounds by statute.) The failure to request a statement of decision also leads to application of the most basic rule of appellate review: "'All intendments and presumptions are indulged to support [the appealed judgment] on matters as to which the record is silent, and error must be affirmatively shown.'" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

Although Plummer asserts he is not challenging the sufficiency of the evidence, his appellate argument centers on his contention the trial court erred in finding the parties did not intend to create an open book account, which is a question of fact. "Whether a book account exists between parties is a question of fact. [Citations.] Further, whether a book account is open or closed is a question of fact." (*Cochran v. Rubens* (1996) 42 Cal.App.4th 481, 485.) Part of the trier of fact's function in deciding whether a book account exists is examining "the agreement, or lack of agreement, between the parties and their conduct in the context of their commercial dealing." (*Maggio, Inc. v. Neal* (1987) 196 Cal.App.3d 745, 752.)

When "a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, which will support the determination.…" (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874, italics omitted.) Substantial evidence is

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opposing party, and the date judgment was entered is already a fact before the Court, as Plummer testified to that date in the trial court. In addition, Plummer fails to specify the relevance of the receiver's reports to the resolution of this appeal. (See *Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063 [matter to be judicially noticed must be relevant to a material issue].)

of "'ponderable legal significance [and] must be reasonable … , credible, and of solid value.…'" (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.) "The ultimate determination is whether a *reasonable* trier of fact could have found for the respondent based on the *whole* record." (*Id.*, 22 Cal.App.4th at p. 1633.)

Here, the trial court found that Plummer and Mapleleaf entered into a contingency fee agreement, whereby Mapleleaf agreed to reimburse Plummer for costs he advanced at the conclusion of the underlying litigation. Substantial evidence supports this finding. It is this finding that is fatal to Plummer's open book account claim because it is "well settled that monies which become due under an *express* contract … cannot, *in the absence of a contrary agreement between the parties*, be treated as items under an open book account so as to allow the unpaid creditor to evade or extend the statutory limitations period. [Citations.]." (*Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1343.) No evidence was presented that the parties intended to convert their express contract into an open book account. Plummer certainly did not treat the costs he advanced as an open book account, as he testified he expected Mapleleaf to repay him at the conclusion of the underlying litigation because of the provision in Mapleleaf's agreement with Kilborne that it would bear costs incurred before Kilborne substituted in as attorney of record.

Plummer contends he produced sufficient evidence of the written agreement between himself and Mapleleaf to prove the agreement's terms. While this may be true, to the extent Plummer is claiming he is entitled to recover for breach of the written agreement, he did not assert such a cause of action in his complaint, a fact he expressly admitted at trial. Neither did he argue such a theory of recovery in the trial court. In light of Plummer's failure to raise this issue in a timely manner in the trial court, we decline to exercise our limited discretion to consider the issue in the first instance and hold Plummer has waived this issue on appeal. (See *In re Marriage of Eden-King & King* (2000) 80 Cal.App.4th 92, 117 ["issues or theories not properly raised or presented

in the trial court may not be asserted on appeal, and will not be considered by an appellate tribunal"].)

Plummer also did not assert a claim for breach of oral contract, presumably because such a claim would be barred by the two-year statute of limitations applicable to oral contracts (Code Civ. Proc., § 339). While a cause of action for open book account would be timely, as it is subject to a four-year statute of limitations for written contracts (Code Civ. Proc., § 337), Plummer cannot transmute an action for breach of an oral contract into an action based upon his written ledger to lengthen the applicable statute of limitations. His effort must fail, as numerous courts have rejected the device of pleading an open book account or account stated in lieu of the oral contract to extend the statute of limitations when the common counts and contractual cause of action are factually identical in all material respects. (See, e.g., *Filmservice Laboratories, Inc. v. Harvey Bernhard Enterprises, Inc.* (1989) 208 Cal.App.3d 1297, 1307-1308; *Warda v. Schmidt* (1956) 146 Cal.App.2d 234, 237; see also *Iverson, Yoakum, Papiano & Hatch v. Berwald* (1999) 76 Cal.App.4th 990, 996.)

For the first time in this litigation, Plummer contends he can enforce the retainer agreement between Kilborne and Mapleleaf, which stated that Mapleleaf would bear litigation costs incurred before Kilborne's substitution into the case, because he is a third party beneficiary of Kilborne's agreement with Mapleleaf. Plummer, however, never asserted a claim for breach of the written retainer agreement between Kilborne and Mapleleaf in his complaint, or argued this theory in the trial court. His failure to raise this theory below waives this claim on appeal and we decline to consider it. (*In re Marriage of Eden-King & King*, *supra*, 80 Cal.App.4th 92, 117.)

In sum, we find no error in the trial court's decision that Plummer did not establish an open book account.[2]

DISPOSITION

The judgment is affirmed. Respondent is awarded his costs on appeal.

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Gomes, J.

WE CONCUR:

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Harris, Acting P.J.

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Wiseman, J.

[2] Since we conclude there was no evidence the parties intended an open book account, which is dispositive of Plummer's claim, we need not address the other basis for the trial court's decision, namely the effect of payments Plummer made on Mapleleaf's behalf after he substituted out of the case.